It is urged in effect that the appellate court may overlook an omission by the court below to comply with a procedural provision, if there is no failure of justice.

I think *Chong Chee Fah* v. *Public Prosecutor, supra,* must be distinguished from the present case. In that case the conviction was of an offence unknown to law. In the present case the charges before conviction were in fact amended to offences known to the law.

In *Public Prosecutor* v. *Ong Eng Kiat*[2] the appellant was charged with the offence of receiving. After the defence was concluded the court itself framed a fresh charge of theft in a dwelling house under section 380 Penal Code. Although section 158(i) of the Code provides that any court may alter or add to any charge before judgment is pronounced, Tawlor J. said at page 181: —

"Now the proper time to amend a charge is at the close of the prosecution. This is expressly provided by section 173(h) of the Code which, indeed, not merely authorises but positively requires the court to consider the charge at that stage and, if necessary, amend it. It is true that a charge can be altered at any stage and the alteration in this case, late though it was, is not illegal in the sense that it was not an amendment but a substitution and further, it was the substitution of a much more serious charge."

I am obliged to Mr. Ramachandaran for having drawn my attention to the case of *Govindasamy* v. *Public Prosecutor.*[3] The Court of Appeal in that case held that the omission to comply with those mandatory provisions of the Code is not merely an irregularity which can be cured by section 422.

In *Lim Tuan Hong* v. *Hermann Jebson & Co.*,[4] dealing with a case similar to the present in Penang, Wood J. at page 81 remarked: —

"... the omission to read the amended charge to the prisoner, was an irregularity of a grave kind, and... I think that in the interests of justice, the irregularity should not be overlooked."

Section 158(ii) is clearly a mandatory provision. Although *Govindasamy's* case was a decision made on the omission by a trial judge to give judgment as required by section 198(i) of the Code after the assessors had given their opinion that the accused was guilty of murder, I am of the opinion that the mandatory provisions referred to by the Court of Appeal should include section 158(ii) of the Code. *Lim Tuan Hong's* case has stood the test of time. It was decided in 1885.

The omission by the learned magistrate to read and explain the amended charges to the appellant in the present case is therefore not curable by section 422 of the Code, as it is contrary to a statutory requirement. However, in neither of the two cases which I have just cited the courts declared that the proceedings were a nullity.

I would therefore allow the appeal, quash the conviction and sentence and order a new trial before another magistrate. Pending the new trial the appellant is allowed bail in the sum of $2,000 with one surety.

Appeal allowed. New trial ordered.

Solicitors: *N. Ramachandran & Co.*

HAJJAH SITAM v. HASSAN & ANOR.

[A.C.J. (Wan Suleiman J.) July 18, 1973]

[Seremban — Civil Appeal No. 7 of 1970]

Customary Tenure Enactment (F.M.S. Cap. 215), s. 5 — Whether customary land is vested in holder or in the waris — Submission of no case to meet — Subordinate Courts Act 1948 (Act 92), s. 70 — Subordinate Courts Rules, 1950.

The appellant had sued for recovery of immovable property which she claimed were being wrongfully occupied by the respondents, who were her granddaughter and the latter's husband. The defence was *inter alia* that since the land in question was customary land it was vested under customary law in the *waris* of the plaintiff and not solely in the plaintiff so that the second appellant was one of the co-owners of the land. It was argued that the action concerned a dealing in customary land within the meaning of section 5 of the Customary Tenure Enactment. The learned magistrate dismissed the claim and the appellant appealed.

Held: (1) the dealings contemplated in section 5 of the Customary Tenure Enactment must be of the nature of transfer, charge or transmission and does not include a suit for ejectment or for the recovery of immovable property;

(2) the appeal must be allowed and the case remitted for re-trial.

Case referred to:-

(1) *Yuill* v. *Yuill* [1954] 1 All E.R. 183.

CIVIL APPEAL.

S. K. Lingam for the appellant.

First respondent in person; second respondent absent.

Wan Suleiman J.: The appellant is the plaintiff in a civil action before the magistrate, Kuala Pilah, wherein she sued for the recovery of immovable property *i.e.* for possession of premises situated on E.M.R. 79 Lot 503 in the Mukim of Juasseh, District of Kuala Pilah, which she claimed were being wrongfully occupied by her grand daughter and the latter's husband, who were tenants at will. In so far as the plaintiff is concerned therefore the magistrate would be well within his civil jurisdiction under section 70 of the Subordinate Courts Act, 1948 (Act 92).

Counsel for the defendants, at the close of the case for the plaintiff made submissions on the law, the gist of which was that this action concerns a dealing in customary land within the meaning of section 5 of the Customary Tenure Enactment (Cap. 215) of the Laws of the Federated Malay States.

The amended statement of defence alleged (1) that since the land in question is customary land, it is vested under customary law in the *waris* of the plaintiff and not solely in the plaintiff, so that the second defendant is one of the co-owners of the land, and alternatively (2) that by adoption and on a ceremony, the land had been given by the plaintiff to the second defendant.

The first issue of law, and the second of fact the plaintiff denied in her reply to the amended defence.

I would apply the *ejusdem generis* rule and say that dealings which are contemplated in section 5 must be of the nature of a transfer, charge or transmission and does not include a suit for ejectment or for the recovery of immovable property.

Since issue (1) above is an issue of law and should not by right have appeared in the pleadings, and should

properly have been raised as a legal issue on a preliminary objection, I should perhaps dispose it off summarily.

M. B. Hooker in his work on "Adat Laws in Modern Malaya" says at page 209:

"Adat perpateh recognizes two forms of property, pesaka — ancestral, and charian — acquired. The most important form of pesaka is, of course, land, and its inheritance is restricted to female descendants of the holder. In some cases, a male may have a life interest in such land but he cannot sell, mortgage or lease it. Since 1909, the Customary Tenure Enactment (c. 215) has laid it down that *tanah pesaka* can only be transferred to a member of one of the twelve 'tribes' of Negri Sembilan (section 7(i)). Further, sale outside the holder's clan and, in some luak, lineage, is permitted only when clan and lineage members have been given an option to purchase.

Now this act does not amount to the proposition that *tanah pesaka* is subject to 'group ownership' or that it is held 'in trust for the tribe'. The holder of *tanah pesaka* has full rights of ownership from her individual point of view, i.e. she can entirely dispose of her interest by sale or mortgage."

In so far as the submission by learned counsel for the respondents/defendants is to be treated as a submission of no case to meet, the Subordinate Courts Rules, 1950 are silent as to what should be done where a submission is not successful. Order 1 rule 2 allows the court to apply any appropriate provision with such modifications as may be necessary. Since there had been no election by the respondents, either expressed or implied, not to call evidence if the submission that there is no case to answer is rejected, I should apply the High Court practice and follow the procedure set out in *Yuill* v. *Yuill*[1] and hold that the respondents have not lost the right to call evidence.

Accordingly I allow the appeal and remit this case to the Magistrate's Court, Kuala Pilah, for retrial, or, if the parties agree, for the trial to be continued under Order XIX rule 11 of the Subordinate Courts Rules.

Costs to the appellant.

Order accordingly.

Solicitors: *Joseph & Son.*

TUCK SENG LOONG TRANSPORT SERVICE CO. LTD. v. MALAYAWATA STEEL LTD. & ANOR.

[O.C.J. (Chang Min Tat J.) July 21, 1973]

[Penang — Civil Suit No. 25 of 1968]

Carriage of Goods — Contract for transport of machineries — Tender — Bill of quantities part of contract — Whether contract a divisible one — Whether there was breach of contract.

The first defendant had invited tenders for the provision of transport to carry machinery and equipment and the tender documents included detailed specifications of the machinery to be transported. The plaintiff successfully tendered for the job and entered into an agreement with the defendants. The tender was for $178,917.50 or such other sum as may be ascertained in accordance with the specifications. The plaintiff received only $114,557.12 and its therefore sued for the balance of $64,360.38 less an amount of $8,415.00 which it had waived for breach of contract. The defendant alleged that the contract was a divisible one and that the plaintiff had been paid for all the work it had performed under the contract and had no further claims on them.

Held: (1) the contract entered into by the parties was for the carriage of goods as set out in the bill of quantities at specific rates and was not a divisible contract;

(2) the evidence showed that other transport was used by the defendant and therefore the plaintiff was entitled to damages for breach of contract.

Cases referred to:

(1) *Burton* v. *Great Northern Railway* Co., 9 Exch. 506; 156 E.R. 216.

(2) *Attorney General* v. *Stewarts & Co.*, 18 T.L.R. 131.

CIVIL SUIT.

N. Marjoribanks and *Lall Singh* for the plaintiff.

I. K. Cheah for the first defendant.

H. Cheah for the second defendant.

Chang Min Tat J.: When the first defendant constructed a steel mill in Prai, it required transport facilities to carry the machinery and equipment to be imported for the mill from the docks to the site. Some of the plant had to pass through an intermediate stage of storage. Accordingly tenders for the provision of transport were invited. The first defendant issued a form of instruction for tendering (pages 2-3 of Agreed Bundle A) and a form of tender (pages 4-5 of A) together with specifications (pages 6-14 of A) and an addendum (pages 15-17 of A). The successful tenderer, in this case, the plaintiff, entered into an agreement, which is at pages 18-19 of A.

The tender was for $178,917.50 "or such other sum as may be ascertained in accordance with the specifications." In the event, the plaintiff received only $114,557.12 and therefore sued for the balance of $64,360.38 less an amount of $8,415 which it had waived, for breach of contract, alternatively for loss of profits.

The agreement entered into specified that (a) the tender, (d) the specifications and addendum, (e) the bill of quantities, (f) the letters and cablegrams listed in the schedule thereto and (g) the letter of acceptance dated 28 July 1966 and the reply thereto from the contractor dated 30 July 1966 "shall be deemed to form and be read and construed as part of this Agreement."

It was drawn up between the plaintiff as contractor and the first defendant as employer. It was executed on behalf of the first defendant by one K. Kuroda, who signed under the stamp of the second defendant firm and who described himself as chief of Malayawata Steel Mill Construction Team. The correspondence referred to was carried on between the plaintiff and the second defendant. The second defendant was at all times described as the management agent of the first defendant. The first defendant was therefore never at any time absent from the picture. It was a disclosed principal. Despite this, an attempt was made by the first defendant to say there was no privity of contract but, at the hearing, the first defendant abandoned this line of defence and joined hands with the second defendant in denying that there was any breach of contract or any basis for the claim for loss of profits. They grounded their defence on the contention that the contract was a divisible one, and that the plaintiff had been paid for all the work it had performed under the contract and had no further claims on them. There were other defences which must appear surprising in the light of the documents produced but fortunately they were also abandoned. There was therefore general agreement between the parties that if